

***United States Court of Appeals
for the Second Circuit***



APPENDIX

DOCKET No. 75 - 1053

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

ERNEST HARVEY, JUNIOR,

Appellant

On Appeal from the United States District Court
for the District of Vermont

APPELLANT'S APPENDIX D

Bennett E. Greene, Esquire
Attorney for the Defendant-Appellant,

Appointed

(JUDGE'S CHARGE TO JURY)

7

PAGINATION AS IN ORIGINAL COPY

1 you have and whatever decision you make, is entirely your
2 own.

3 Now, I indicated to you at the commence-
4 ment of this case, and I asked you whether the fact that
5 Monday is a federal holiday would interfere with any of you
6 and you advised me it would not. It is a Federal holiday
7 and in general this building is not going to be open.
8 However, the marshal has assured me he's made the necessary
9 arrangements for Court personnel, anybody coming to Court,
10 let's put it that way, to get here all right.

12 If, for any reason there's a foul up
13 when you arrive and for some reason it doesn't seem like
14 you can get from the first floor to the fifth floor, don't
15 be discouraged and don't go away please. Stick around;
16 we'll see that you're transported between the two floors.

18 So I ask you to have a pleasant weekend;
19 not to discuss the case with anybody, and we'll stand in
20 recess until 9:30, Monday morning. (4:45 P.M.)

21 (THIS TRIAL ADJOURNED AT 4:45 P.M., 25 OCTOBER 1974, and
22 RECONVENED AT 9:30 A.M. OCTOBER 28, 1974)

23 SIXTH DAY

24 MORNING SESSION . 9:30 A.M.

25 (Jury Present)

26 THE COURT: Ladies and gentlemen, I'm
27

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1 going to appoint Mrs. NUCEDER as your foreman.

2 This case is a criminal prosecution
3 brought by the United States against the defendant, Ernest
4 HARVEY, Jr. The grand jury indictment charges the defendant,
5 Ernest HARVEY, Jr. in five separate counts. Originally
6 there were six counts but the Court has dismissed Count 5
7 with the agreement of counsel, and therefore, that count is
8 not for your consideration.
9

10 Count 1 charges that from or about
11 July 1, 1973 up to and including August 4, 1973, the
12 defendant, Ernest HARVEY, Jr. together with Gerald L. DUNHAM,
13 unlawfully, willfully and knowingly did combine, conspire,
14 confederate and agree together with each other and with
15 other persons known to the grand jury, to commit offenses
16 against the United States, to wit, to violate Title 18,
17 United States Code, sections 2314, 842 and 844.
18

19 These statutes relate to the interstate
20 transportation of stolen property and two dynamite offenses.
21 The indictment charges that in furtherance of said unlawful
22 conspiracy for the purpose of effecting the objectives
23 thereof, the defendant, Ernest HARVEY, together with
24 Gerald DUNHAM, committed the following overt acts:
25

26 1. On or about August 3, 1973, Gerald
27 L. DUNHAM, also known as Gary DUNHAM, and Ernest HARVEY, Jr.,

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1 the defendant, traveled from the vicinity of Barre, Vermont
2 to Newport, New Hampshire.

3 2. During June, July and August 1973,
4 the co-conspirators, Gerald L. DUNHAM, also known as Gary
5 DUNHAM, and the defendant, Ernest HARVEY, Jr., had conver-
6 sations with each other.

7 Count 2 charges that on or about
8 August 3, 1973, Gerald L. DUNHAM, also known as Gary DUNHAM,
9 and the defendant, Ernest HARVEY, jr., unlawfully, willfully
10 and knowingly did transport and receive and attempt to trans-
11 port and receive in interstate commerce from the District of
12 Vermont to Newport in the State of New Hampshire, explosives,
13 to wit, dynamite, with the knowledge and intent that it would
14 be used to damage and destroy buildings and other real and
15 personal property.
16

17 Count 3 charges on or about August 3,
18 1973, Ernest HARVEY, Jr., the defendant, having been convicted
19 on October 22, 1970 in the Superior Court of Grafton, New
20 Hampshire, of burglary, a crime punishable by imprisonment
21 for a term exceeding one year, unlawfully, willfully and
22 knowingly did ship and transport an explosive, to wit,
23 dynamite, in interstate commerce from the District of
24 Vermont to the State of New Hampshire, and did receive said
25 explosive which had been so shipped and transported.
26
27

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1 Count 4 charges on or about August 3,
2 1973, in the District of Vermont and elsewhere, Gerald L.
3 DUNHAM, also known as Gary DUNHAM, and the defendant, Ernest
4 HARVEY, Jr., unlawfully, willfully and knowingly did
5 receive, conceal, transport and dispose of explosive mater-
6 ials, to wit, dynamite, knowing and having reasonable cause
7 to believe that such explosive materials were stolen.
8

9 Count 5 has been dismissed as I have
10 advised you and is no longer for your consideration.

11 Count 6 charges that from on or about
12 August 1, 1973 up to and including September 15, 1973, in
13 the District of Vermont, Gerald L. DUNHAM, also known as
14 Gary DUNHAM, and the defendant, Ernest HARVEY, Jr., and
15 others to the Grand Jury known and unknown, unlawfully,
16 willfully and knowingly did combine, conspire, confederate
17 and agree together and with each other to injury, oppress,
18 threaten and intimidate Byron NUTBROWN III, a citizen of
19 the United States of America, in the free exercise and
20 enjoyment of a right and privilege secured to him by the
21 Constitution and laws of the United States, and because of
22 his having exercised said right and privilege, to wit, the
23 right and privilege to give information to the proper author-
24 ities concerning violations of federal law, specifically
25 violations of Title 18, United States Code, sections 371, 2314,
26
27

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1 842 and 844.

2 The indictment further alleges that
3 it was part of the plan and purpose of said conspiracy
4 that on or about September 8, 1973, the defendant, Ernest
5 HARVEY, Jr. did transport said Byron NUTBROWN III in an
6 automobile to a place in or near Williamstown, Vermont,
7 where Gerald L. DUNHAM, also known as Gary DUNHAM, awaited
8 them, for the purpose of interfering with Byron NUTBROWN III's
9 anticipated testimony and statements with respect to the
10 facts surrounding an attempted burglary at Lavalley's Lumber
11 Yard, Newport, New Hampshire, and violations of federal
12 explosive materials statutes, which are 18 United States
13 Code, sections 842 and 844, of the National Stolen Property
14 Act which is 18 United States Code, section 2314, and
15 conspiracy, 18 United States Code, section 371, in connection
16 therewith.
17

18
19 The indictment concludes that the alleged
20 conspiracy resulted in the death of Byron NUTBROWN III.

21 Your verdict should not be influenced by
22 the fact that the defendant was indicted for these offenses
23 by the grand jury. An indictment is merely a formal proced-
24 ural method of accusing a defendant or defendants of a crime
25 preliminary to trial.
26

27 An investigation by a grand jury is

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1 wholly one-sided in the Government's favor. The Government
2 presents the grand jury all the evidence favorable to the
3 Government in order to return an indictment. And the
4 defendant has no opportunity to present evidence favorable
5 to him.

6
7 Therefore, the indictment is not evidence
8 of any kind against the defendant, and does not create any
9 presumption or permit any inference of the defendant's guilt.

10 The defendant has pleaded not guilty
11 to the charges contained in the indictment. You have been
12 chosen and sworn as jurors in this case to determine the
13 issues of facts presented by the allegations of the indict-
14 ment, and the denial made by the not guilty plea of the
15 defendant.

16
17 You are to perform that duty without
18 bias or prejudice to any party.

19 You have observed that the defendant
20 did not take the stand to testify in his own behalf. He
21 has a constitutional right not to do so. One of the highest
22 constitutional safeguards in our system of criminal justice
23 is that a defendant is not obliged to testify or to produce
24 evidence in his own behalf, and may not be called as a
25 witness by the prosecution or compelled to give evidence
26 against himself. The exercise by a defendant of his right
27

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1 not to testify raises no presumption of guilt and permits
2 no unfavorable inference of any kind to be drawn.

3 In determining the defendant's guilt or
4 innocence of a crime charged, you are not to consider in any
5 manner whatsoever the failure of the defendant to testify as
6 a witness or to produce evidence in his own behalf.

7
8 There has been evidence introduced
9 establishing that the defendant has been convicted of a
10 previous offense. I must caution you that this evidence
11 has absolutely no bearing upon the defendant's guilt or
12 innocence as to Counts 1, 2, 4 or 6, as I shall explain
13 further. It relates solely to the offense alleged in
14 Count 3, and can be considered only in considering one of
15 the elements in that count.

16
17 The law presumes a defendant to be
18 innocent of a crime with which he is charged. This presumption
19 of innocence continues throughout the trial down to the time
20 in the jury room, if that time does arrive. When you are
21 satisfied from all the evidence beyond a reasonable doubt
22 that the defendant is guilty of the crime charged.

23
24 The law permits nothing but legal evidence
25 presented before this jury to be considered in support of the
26 charges against the accused. So the presumption of innocence
27 alone is sufficient to acquit the defendant, unless you are

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1 satisfied beyond a reasonable doubt of the guilt of the
2 defendant from all of the evidence in the case.

3 You have seen and heard the evidence
4 produced in this trial, and it is the sole province of the
5 jury to determine the facts of the case. But first I would
6 like to call to your attention certain guides by which you
7 are to evaluate the evidence.

8 The burden of proof is on the Government
9 to prove each element of the charges against the defendant
10 beyond a reasonable doubt. You can not find the defendant
11 guilty unless you determine that the Government has estab-
12 lished by the evidence each and every essential element of
13 the crimes charged against him beyond a reasonable doubt.

14 However, to support a verdict of
15 guilty, you need not find every fact beyond a reasonable
16 doubt. You need only find that the crime charged has been
17 proven beyond a reasonable doubt from all of the evidence
18 in the case.

19 A reasonable doubt is a fair doubt
20 based upon reason and common sense and arising from the
21 state of the evidence. By proof beyond a reasonable doubt
22 you are not to understand that all doubt is to be excluded.
23 It is rarely possible to prove anything to an absolute
24 certainty. It must be a substantial doubt such as would
25
26
27

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1 make an honest and sensible and fair minded person hesitate
2 to act in a serious and important matter wherein ascertainment
3 of the truth was consciously being sought.

4 A reasonable doubt may arise not only
5 from the evidence produced but also from a lack of evidence.
6 The law never imposes upon a defendant in a criminal case the
7 burden or duty of producing any evidence and since the burden
8 is always upon the Government to prove the accused guilty
9 by proving beyond a reasonable doubt every essential element
10 of the crime charged.

12 And the defendant has the right to
13 rely upon a failure of the prosecution to establish such
14 proof. The defendant may also rely upon evidence brought
15 out on cross examination of witnesses for the Government.

17 If after impartial consideration of
18 all of the evidence you can candidly say that you are not
19 satisfied of the guilt of the defendant beyond a reasonable
20 doubt, you should find the defendant not guilty.

21 There are two types of evidence which
22 a jury may consider in determining whether or not a defendant
23 is guilty as charged. One is direct evidence, such as the
24 testimony of an eye witness. The other is circumstantial
25 evidence which consists of proof of a chain of circumstances
26 from which a conclusion regarding essential facts in the

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1 case may logically be drawn.

2 Regardless of the nature of the evidence,
3 the law requires that before convicting a defendant, the
4 jury must be satisfied of the defendant's guilt beyond a
5 reasonable doubt from all of the evidence in the case.
6 Circumstantial evidence is legal and proper for you to
7 consider, and you may convict upon this class of evidence
8 alone, if thereby you are persuaded beyond a reasonable
9 doubt of the defendant's guilt.
10

11 But the circumstances must be such as
12 will lead the guarded discretion of a just and reasonable
13 man to the conclusion that the crime charged has been
14 committed, and that a defendant is guilty of its commission.
15

16 You will recall that counsel in this
17 matter have stipulated or agreed as to certain facts. You
18 must accept such stipulations as evidence and regard the
19 stipulated facts as proof. Any testimony which has been
20 excluded or which has been stricken from the record is not
21 evidence in the case, and you will entirely disregard it
22 in arriving at your verdict.
23

24 Likewise, the arguments of the attorneys
25 and any statements which they made in their arguments are
26 not evidence and will not be considered as evidence by you.
27 You will render your verdict only from the evidence in the

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1 case which consists of the sworn testimony of the witnesses,
2 the stipulations of counsel and all exhibits which have
3 been received in evidence. It's your recollection of the
4 witnesses' testimony and not the attorney's statements as
5 to what that testimony was, which shall control you in
6 reaching your decision.

7
8 But in your consideration of the evidence,
9 you are not limited to the bald statements of the witnesses.
10 On the contrary, you are permitted to draw from the facts
11 which you find have been proved such reasonable inferences
12 as are justified in the light of your own experience.

13 If you feel that witnesses differed as
14 to what the facts were, it's generally a safer way to
15 reconcile the conflicting testimony if you reasonably can,
16 upon the theory that all of the witnesses intended to tell
17 the truth. If you can not so reconcile the testimony, then
18 you must determine from all of the evidence before you
19 which of the witnesses is entitled to greater credibility.

20
21 The credibility of the witnesses and
22 the weight to be given their testimony are questions entirely
23 for your determination. The law is that you are not bound
24 to give the same weight, the same credit or have the same
25 faith in the testimony of each witness, but you should give
26 their testimony just such weight, just such credit and have
27

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1 just such faith in it that you think it is fairly entitled to
2 receive.

3 Consider the appearances of the witnesses
4 on the stand; their candor or lack of candor, their feelings
5 or bias if any; their interest in the result of the trial
6 and the reasonableness of the testimony they gave; and
7 believe as much or as little of the testimony of each witness
8 as you think you ought to.

9
10 If you find that any of the witnesses
11 in this action made statements outside of Court inconsistent
12 with their testimony in Court as to the facts involved in
13 this case, you may consider these inconsistent statements
14 only for the purpose of impeachment of the witness and not
15 for the purpose of showing the same to be true. The witness
16 is presumed to speak the truth but if you reach the conclu-
17 sion that any witness in the case has willfully or deliberately
18 given false testimony about any material fact, you may
19 reject from consideration all of his or her testimony, or
20 you may accept such part as you may deem true and disregard
21 that which you feel is false.

22
23 There has been evidence in this case
24 concerning the previous criminal record of an accomplice.
25 You may consider this evidence of a previous criminal record
26 as bearing on the credibility of this individual and weight
27

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1 to be given his testimony. However, such evidence has no
2 relation to the substantive crimes charged and you are not
3 to consider such evidence as bearing on the guilt or
4 innocence of the defendant.

5 An accomplice is one who unites with a
6 person in the commission of a crime voluntarily and with
7 common intent. The accomplice does not become incompetent
8 as a witness because of a participation in a crime charged.
9 On the contrary, the testimony of an accomplice alone, if
10 believed by you, may be sufficient weight to sustain a
11 verdict of guilty even though not collaborated or supported
12 by other evidence.

13 However, the jury should keep in mind
14 that such testimony is always to be received with caution
15 and weighed with great care. You should never convict the
16 defendant upon the unsupported testimony of an alleged
17 accomplice unless you believe that unsupported testimony
18 beyond a reasonable doubt.

19 There has been testimony introduced in
20 this case which we call expert testimony. In this regard,
21 I refer to the testimony of Harold LINDE, the chemist,
22 Dr. Alphons MORALI, the dentist, and Dr. Ronald WRIGHT, the
23 forensic pathologist.

24 An expert is a person who, by reason of

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1 special study, training and experience as to a given subject,
2 has knowleged concerning that subject superior to other
3 people in general. The value of expert testimony or opinion-
4 ed evidence given by an expert depends upon the honesty and
5 ability of the witness upon the facts used by him as a basis
6 for his opinion and upon his opportunity for observation.
7 If the facts used by him for a basis are proved and his
8 qualifications are high and he is honest and impartial
9 and has ample opportunity to make proper observations and
10 studies, his opinion may be of great value. While if his
11 opinion is based upon a state of facts which the evidence
12 does not sustain, or upon a very limited opportunity to
13 make observations, his testimony may be of little value.

14
15 Expert testimony is to be weighed by
16 you with all of the other testimony in the case, and the
17 weight of all the expert testimony in this case is for you
18 and you alone to decide.

19
20 Having in mind the general guidelines that
21 I have just given you, it now becomes my duty to instruct
22 you as to the law applicable to your determinations in this
23 case. It is your duty as jurors to follow the law as
24 stated in these instructions, and to apply the rules of law
25 so given to the facts as you find them from the evidence.
26 You will not be justified under your oath as jurymen in
27

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1 finding a verdict contrary to the law as the Court gives it
2 to you.

3
4 It is the sole province of the jury to
5 determine the facts in the case. The Court does not by
6 any instructions given to you intend to persuade you as
7 to how you should decide any question of fact. It is your
8 duty to decide all of the facts from the evidence.

9 All parties have a right to expect that
10 you will carefully and impartially consider all the evidence
11 in the case, follow the law as stated by the Court and reach
12 a just verdict.

13 I will charge you with respect to the
14 dynamite counts, that is counts two through four first; then
15 I will discuss counts one and six.

16
17 Counts one and six are both conspiracy
18 counts, and as such, they involve the application of special
19 rules which will require a more detailed explanation. For
20 that reason, I want to talk about counts one and six as
21 closely together as possible so that the same general
22 principles which apply to both counts need not be restated.

23
24 With respect to counts two through four
25 which relates to the alleged violation of the federal laws
26 pertaining to the importation, manufacture, distribution
27 and storage of explosive materials, the Government has also

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1 charged the defendant with violating 18, United States Code,
2 section 2, which is generally referred to as the aiding and
3 abetting statute.

4 An aider or an abettor within the mean-
5 ing of this act is one who assists the perpetrator of a
6 crime. There are two essential elements to this offence,
7 some overt conduct in the intent to violate the law.

8 With reference to the first element, to
9 aid or abet the perpetrator of a crime, requires that the
10 defendant associated himself with ^{the} illegal venture, that he
11 participate in it as something he wishes to bring about, and
12 that he seeks by his actions to make it succeed. The
13 defendant's mere association with those who committed the
14 crime or knowledge that the crime was to be committed, are
15 not sufficient to establish this offense: You, the jury,
16 must be convinced beyond a reasonable doubt that the
17 defendant was a participant or a substantial assistant in
18 the commission of the crime rather than merely a knowledge-
19 able spectator.

20 With regard to the second element of
21 the aiding and abetting offense, I instruct you that each
22 offense which the defendant is accused of committing by
23 counts 2, 3, and 4, are ones which require specific criminal
24 intent or a culpable purpose in order to find him guilty.

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1 Thus, if you find that the defendant was a participant or
2 substantially assisted in the offenses alleged in counts
3 t o through four of the indictment, you must then decide
4 beyond a reasonable doubt whether the defendant did so will-
5 fully and knowingly in a community of unlawful purpose with
6 some other person.

7
8 An aider or abettor is punishable the
9 same as the principal, the one who actually commits the
10 crime, and thus, the intent needed to convict the defendant
11 must be the same as is required to convict the principal.
12 In other words, aider and abettor must have the same know-
13 ledge and intents required as the principal. Thus, proof
14 of the defendant's knowledge of the illegal possession and
15 transportation of dynamite is necessary to convict him.

16
17 In order to find the defendant guilty of
18 aiding and abetting, you must find that the defendant
19 acted willfully and knowingly in aiding and abetting the
20 possession and transportation of dynamite.

21 I will now proceed to consider the
22 specifics of counts two through four.

23
24 Count two of the indictment, in
25 substance, charges that the defendant together with Gerald
26 DUNHAM, unlawfully, willfully and knowingly transported
27 dynamite from Vermont to New Hampshire, with the knowledge

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1 and intent that it would be used to damage and destroy
2 buildings and other real and other real and personal property.
3 This allegation is based upon 18, United States Code, section
4 844.d.

5 In order to find the defendant guilty
6 on count two, you must find beyond a reasonable doubt each
7 of the following essential elements. First, that on or
8 about August 3, 1973, Ernest HARVEY, Jr. transported or
9 aided and abetted the transportation of dynamite from
10 Vermont to New Hampshire.

12 Second, that he did so with the knowledge
13 and intent that the dynamite would be used to damage and
14 destroy buildings or other real and personal property;

16 And third, that he acted willfully and
17 knowingly.

18 The first element of the crime that the
19 Government must prove beyond a reasonable doubt is that the
20 defendant either transported or aided and abetted the
21 transportation of dynamite from Vermont to New Hampshire.
22 In this regard, you should consider the general principles
23 relating to aiding and abetting which I discussed earlier.

25 As the second element of this offense,
26 the Government must prove that the defendant transported
27 the dynamite with the knowledge and intent that the dynamite

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1 would be used to damage or destroy buildings or other real
2 and personal property. In this regard, you should consider
3 whether or not the Government has established that the
4 Defendant HARVEY knew what the dynamite was to be used for
5 or what its intended use was.

6
7 The third element of this offense is
8 that the defendant acted willfully and knowingly. By
9 willfully and knowingly, I mean that the defendant must
10 have acted voluntarily and intentionally with the intent
11 being to disobey or disregard the law.

12 Knowledge of a defendant need not be
13 proved by direct evidence and indeed, it seldom can be.
14 However, like any other facts and issues, it can be
15 established by circumstantial evidence.

16
17 The meaning and significance of a
18 particular act or conduct may be and usually does depend
19 upon the circumstances surrounding the act or conduct. You
20 should consider the acts and conduct of the defendant, and
21 whether such facts, if you believe them, make it likely or
22 unlikely, probable or improbably, that the defendant fully
23 and precisely understood what he was doing.

24
25 In count 3, the indictment alleges that
26 the defendant, having been convicted of an offense punishable
27 by a term of imprisonment exceeding one year, unlawfully,

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1 willfully and knowingly transported dynamite from Vermont to
2 New Hampshire, and also received dynamite which had been so
3 shipped. The elements of the offense which must be
4 established beyond a reasonable doubt are as follows:

5 First, that on or about August 3, 1973,
6 Ernest HARVEY, Jr. transported dynamite in interstate commerce
7 or that he aided and abetted such transportation.
8

9 Second, that at the time he did so,
10 HARVEY had been convicted of a crime punishable by imprison-
11 ment for a term of more than one year.

12 Three, that he acted willfully and
13 knowingly.

14 With respect to the first element, you
15 should consider the general principles with respect to
16 aiding and abetting which I outlined earlier. In all other
17 respects, I think the description of the elements of the
18 offense is sufficiently clear, as to warrant no further
19 comments on my part.
20

21 The second element requires that the
22 defendant, at the time he transported the dynamite
23 had been convicted of a crime punishable by a term of
24 imprisonment for a term of one year. There has been uncon-
25 troverted evidence introduced that the defendant in 1970
26 was convicted of such an offense punishable by a term of
27

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1 imprisonment exceeding one year. Nevertheless, you are
2 required to find this element beyond a reasonable doubt.

3 I wish to caution you that the evidence
4 of the defendant's prior conviction is to be considered by
5 you only in connection with this element of count 3. And
6 it is not to be considered by you to establish the
7 defendant's criminal character in any way.

8 The requirement that the defendant acted
9 willfully and knowingly is the same in this count as I
10 explained to you in connection with court 2.

11 The fourth count of the indictment
12 alleges that on or about August 3, 1973 Gerald DUNHAM and
13 the defendant, Ernest HARVEY, Jr. unlawfully, willfully and
14 knowingly did receive, conceal, transport and dispose of
15 dynamite knowing or having reasonable cause to believe that
16 it was stolen. The essential elements of this offense are:

17 First, that on or about August 3, 1973
18 in the District of Vermont, the defendant, HARVEY, received,
19 concealed, transported or disposed of dynamite, or aided and
20 abetted such receipt, concealment, transportation or disposal.

21 Second, that at the time he did so,
22 HARVEY knew or had reasonable cause to believe that such
23 dynamite was stolen; and third, that he acted willfully and
24 knowingly.

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1 I think the first and third elements of
2 this offense are sufficiently clear as to require no further
3 comment, as long as you keep in mind the general principles
4 which I have outlined previously.

5 The second element requires that the
6 defendant knew or had reasonable cause to believe that the
7 dynamite was stolen. In order to establish this offense,
8 the Government must prove beyond a reasonable doubt that
9 the dynamite was in fact stolen and the defendant knew it
10 was stolen or had reasonable cause to believe it was stolen.
11 The offense charged was the interstate transportation of
12 stolen explosives, and not the theft of the dynamite.

13 I will now charge you with respect to the
14 conspiracy counts.

15 Count one alleges that the defendant,
16 Ernest HARVEY, Jr. together with Gerald DUNHAM was a member
17 of a conspiracy to commit offenses against the United States
18 in violation of 18, United States Code, section 371. The
19 offenses alleged to be the object of the conspiracy are,
20 one, the interstate transportation of stolen property worth
21 more than five thousand dollars, to wit, the proceeds of
22 the attempted burglary. Two, the receipt, concealment,
23 transportation, shipment, storage, barter, sale or disposition
24 of any explosive material knowing or having reasonable cause

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1 to believe that such explosive materials were stolen, and
2 three, the interstate transportation of any explosive with
3 the knowledge or intent that it will be used to kill, injure
4 or intimidate any individual or unlawfully to damage or
5 destroy any building, vehicle or other real or personal
6 property.

7
8 Before you can decide the specifics of
9 this charge, I must advise you of some of the basic princi-
10 ples which are involved in the determination of the offense
11 of conspiracy. A conspiracy is a combination of two or
12 more persons by concerted action to accomplish a criminal
13 or unlawful purpose or to accomplish by criminal or unlawful
14 means some purpose not in itself criminal or unlawful.

15
16 The essence of a conspiracy is the
17 unlawful agreement between the conspirators, but it is not
18 necessary to find an express agreement, orally or written,
19 before you can find that a conspiracy existed. What must
20 be shown, however, is that the members in some way impliedly
21 or expressly came to a mutual understanding. This showing
22 need not be made by direct evidence; it may be and usually
23 is proved by circumstantial evidence.

24
25 It is not necessary for the Government
26 to prove that the objects of the conspiracy were carried out
27 or that the conspiracy was successful. Conspiracy is

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1 punishable whether or not the intended offenses are committed.

2 However, the Government must prove beyond
3 a reasonable doubt that some overt act was committed in
4 furtherance of the conspiracy. This act need not be a
5 criminal act but must be one which tends to accomplish the
6 plan or conspiracy, and must be done in furtherance of the
7 object or purpose of the conspiracy.

8 The offense of conspiracy is a crime
9 when the unlawful agreement or combination is made, and
10 any single overt act to effect the object of the conspiracy,
11 if thereafter done by at least one of the conspirators is
12 attributable to all of the conspirators for the act of one
13 conspirator, done in furtherance of the conspiracy, becomes
14 the act of all, just as in our civil law, the act of one
15 partner becomes the act of all partners.

16 Consequently, if an overt act is per-
17 formed by any co-conspirator including but not limited to
18 the defendant, then the conspiracy is complete. Before you
19 can convict the defendant, Ernest HARVEY, Jr., of the crime
20 of conspiracy to commit an offense or offenses against the
21 United States, you must be satisfied beyond a reasonable doubt
22 that each of the three elements of the offense has been
23 proved with respect to the defendant. There are as follows:

24 One; that the conspiracy charged in the
25

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1 indictment was willfully formed and was existing at or
2 about the date alleged.

3 Two, that the defendant knowingly and
4 willfully became a member of the conspiracy.

5 Three, that one of the conspirators
6 thereafter knowingly committed at least one overt act in
7 furtherance of the conspiracy.
8

9 The first element is that the conspiracy
10 was willfully formed and existed at or about the time alleged
11 in the indictment. The indictment alleges that the conspiracy
12 commenced on or about July 1, 1973, and continued up to and
13 including August 4, 1973.

14 Now, I am talking at this time, ladies
15 and gentlemen, about the conspiracy charged in count one.
16 The Government need not prove that the conspiracy existed
17 over the whole course of time which it is alleged in the
18 indictment. If you feel that within that period, all of
19 the elements of the crime have been demonstrated to your
20 satisfaction beyond a reasonable doubt, then that crime
21 becomes complete and the fact that the Government did not
22 show it as being carried on as early or as long as the
23 indictment says, in itself is not of any importance as far
24 as the elements of the crime are concerned.
25
26

27 In this case, to satisfy the first

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1 element of the offense, you must be satisfied beyond a
2 reasonable doubt that two or more persons combined for the
3 purpose of committing any or all of the three offenses
4 against the United States. The first is to transport in
5 interstate commerce goods, wares, merchandise, securities and
6 money from a value of five thousand dollars or more, to
7 wit, the proceeds of a burglary knowing the same to have
8 been stolen.
9

10 The second is, to receive, conceal,
11 transport, ship and store explosive materials, to wit,
12 dynamite, knowing and having reasonable cause to believe
13 that such explosive material was stolen.
14

15 And third, to transport and receive
16 and attempt to transport and receive in interstate commerce
17 an explosive, to wit, dynamite, with knowledge and intent
18 that it would be used unlawfully to damage and destroy a
19 building and other real and personal property.
20

21 As I pointed out earlier, in order to
22 constitute a violation of this conspiracy count, it is not
23 necessary to show that the conspiracy was successful or that
24 the intended offenses were completed. Furthermore, it is
25 not necessary that the Government prove that the conspiracy
26 actually contemplated violation of each of the three
27 statutory offenses. It is sufficient for the purpose of

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1 count one if you find beyond a reasonable doubt that it was
2 part of the conspiracy to commit any one of the three
3 alleged offenses.

4 You must also find that the second
5 element that the defendant knowingly and willfully partici-
6 pated in the conspiracy with the intent to further some
7 object or purpose of the conspiracy by knowingly and willfully
8 the defendant acted voluntarily and intentionally with the
9 intent being to disobey or disregard the law. By joining
10 the conspiracy, I mean that the defendant became a member
11 of it.

12 Mere association with other conspirators
13 is not sufficient to make one a member of the conspiracy.

14 The third element of the crime of con-
15 spiracy is that one or more of the conspirators during the
16 existence of the conspiracy knowingly committed at least
17 one overt act in an effort to effect some purpose or object
18 of the conspiracy. You must also find that this act or acts
19 follow and tend towards the accomplishment of the plan of
20 the conspiracy.

21 As to count one, two such overt acts
22 were alleged in the indictment. First, on or about August 3,
23 1973, Gerald L. DUNHAM, also known as Gary DUNHAM, and
24 Ernest HARVEY, Jr., the defendant, traveled from the vicinity
25
26
27

CHARGE

1 of Barre, Vermont to Newport, New Hampshire; and second,
2 that during June, July and August 1973, the co-conspirators,
3 Gerald L. DUNHAM, also known as Gary DUNHAM, and the
4 defendant, Ernest HARVEY, Jr., had conversations with one
5 another.

6
7 In considering the elements of the
8 offense of conspiracy, as I have stated them above, you
9 may consider all of the evidence in the case. If you find
10 that each of the elements of the offense of conspiracy
11 have been proved beyond a reasonable doubt with respect to
12 the defendant, then you must return a verdict of guilty
13 against the defendant. If, however, you're not convinced
14 beyond a reasonable doubt as to the guilt of the defendant,
15 you must return a verdict of not guilty as to the defendant.
16

17 We come now to count six of the indictment
18 which charges that from on or about August 1, 1973 up to
19 and including September 15, 1973, Gerald DUNHAM and the
20 defendant, Ernest HARVEY, conspired to injure, oppress,
21 threaten and intimidate Byron NUTBROWN III, a citizen
22 of the United States, in the free exercise and enjoyment of
23 a right and privilege secured to him by the Constitution
24 and the laws of the United States, and because of his having
25 exercised said right and privilege, and because of his
26 having exercised said right and privilege.
27

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Specifically, the indictment refers to the right and privilege to give information to the proper authorities concerning violations of federal law, specifically violations of Title 18, United States Code, sections 371, 2314, 842 and 844. The indictment alleges that it was part of the plan and purpose of the conspiracy that on or about September 8, 1973, the defendant, Ernest HARVEY, Jr., did transport Byron NUTBROWN III to a place in or near Williams-town, Vermont where Gerald DUNHAM awaited for him for the purpose of interferring with Byron NUTBROWN III's anticipated testimony and statements with respect to facts surrounding an attempted burglary at Lavalley's Lumber Yard in Newport, New Hampshire, and violation of federal explosive material statutes, 18, United States Code, sections 842 and 844 of the National Stolen Property Act, 18, United States Code, section 2314; and conspiracy, 18, United States Code, section 371 in connection therewith. The indictment concludes that the alleged conspiracy resulted in the death of Byron NUTBROWN III.

Like the offense alleged in count one, this is a conspiracy charge, and therefore, the same general principles pertaining to conspiracy offenses which I have just discussed previously apply to this count as well. However, there is an important exception, and that is that

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1 the Government does not require to show any overt act in
2 order to establish an offense under the applicable statute;
3 that is under 18, United States Code, section 241.

4 Under this section of the United States
5 Code, penalizing conspiracy to deprive a person of rights
6 secured to him by the Constitution or laws of the United
7 States, a crime is completed by the agreement, and no overt
8 act is necessary.
9

10 Before you can convict the defendant,
11 Ernest HARVEY, Jr., of the crime of conspiracy to violate
12 the civil rights of Byron NUTBROWN III, you must be
13 satisfied beyond a reasonable doubt that each of the elements
14 of the offense has been proved with respect to this
15 defendant. The elements of this crime are as follows:
16

17 First, at sometime from on or about August
18 1, 1973 up to and including September 15, 1973, Ernest
19 HARVEY, Jr. combined, conspired, confederated or agreed
20 with any other person to injure, oppress, threaten or
21 intimidate Byron NUTBROWN III.

22 Second, Byron NUTBROWN III was a citizen
23 of the United States of America.

24 And third, that at least one purpose of
25 the conspiracy to injure, oppress, threaten or intimidate
26 Byron NUTBROWN III was to interfere with his anticipated
27

CHARGE

1 testimony and statements with respect to an attempted
2 burglary at Lavalley's Lumber Yard and the federal dynamite
3 violations and stolen property violations in connection
4 with that attempt.

5 The first element is that the conspiracy
6 was willfully formed and existed at or about the time
7 alleged in the indictment. As I described in connection with
8 count one, the dates are not critical as long as you are
9 convinced beyond a reasonable doubt that the conspiracy
10 existed sometime during the alleged period.

11 You must also find that the defendant
12 knowingly and willfully participated in the conspiracy with
13 the intent to further some object or purpose of the conspiracy.
14 By knowingly and willfully, I mean that the defendant acted
15 voluntarily and intentionally with the intent being to
16 disobey or disregard the law. By joining the conspiracy,
17 I mean that the defendant became a member of it. Mere
18 association with other conspirators is not sufficient to
19 make one a member of the conspiracy.

20 The second element of the offense is
21 that Byron NUTBROWN III, be . . a United States citizen.
22 The evidence establishing Mr. NUTBROWN as a citizen of
23 the United States is uncontradicted.

24 The third element of the offense which
25
26
27

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1 you must find beyond a reasonable doubt is that at least
2 one purpose of the conspiracy was to interfere with
3 Byron NUTBROWN's testimony and statements with respect to
4 the attempted burglary at Lavalley's Lumber Yard, and the
5 federal dynamite conspiracy and stolen property violations
6 in connection with that attempt. You will note that I
7 stated only one purpose of the conspiracy need be to
8 interfere with Byron NUTBROWN's right to give statements
9 and testimony relating to federal crimes. In other words,
10 there may also be other purposes of the conspiracy.
11

12 If, however, you find that one of the
13 purposes of the conspiracy was to interfere with sources of
14 testimony relating to or prevent proof of federal violations
15 then the requirements of section 241 are met.
16

17 Crime charged in this case is a crime
18 which requires proof of specific intent before the defendant
19 can be convicted. Specific intent as the term implies means
20 more than the general intent to commit the act. To
21 establish the specific intent, the Government must prove
22 that the defendant knowingly did an act which the law
23 forbids, purposely intending to violate the law. Such
24 intent may be determined from all of the facts and circum-
25 stances surrounding the case.
26

27 An act is done knowingly if done

CHARGE

1 voluntarily and intentionally and not because of mistake or
2 accident or other innocent reason.

3 In considering the elements of the
4 offense of conspiracy as I have stated them above, you may
5 consider all of the evidence in this case. If you find that
6 each of the elements of the offense of conspiracy have been
7 proved beyond a reasonable doubt in respect to the defendant,
8 then you must return a verdict of guilty against the
9 defendant. If, however, you are not convinced beyond a
10 reasonable doubt as to the guilt of the defendant, you must
11 return a verdict of not guilty as to the defendant.
12

13 If you find that the defendant, Ernest
14 HARVEY, Jr., is guilty of the conspiracy charged in the
15 indictment, then you must go on to determine whether or not
16 the conspiracy resulted in the death of Byron NUTBROWN III.
17

18 If you find the defendant guilty of
19 count six, I will ask you to also make a specific finding
20 as to whether the conspiracy resulted in the death of
21 Byron NUTBROWN and advise as to this at the time you render
22 your verdict.

23 I want to remind you at this time as
24 I did throughout the trial that any statements of Byron
25 NUTBROWN III may have given which were introduced during
26 the course of the trial, either by exhibit or in the course
27

CHARGE

1 of testimony, may be considered by you only in connection
2 with count six, and then not to the truth of the matters
3 asserted in those statements, but solely to show the nature
4 of such knowledge and awareness of Byron NUTBROWN may have
5 had with reference to the items relevant to count six.

6 These statements are to be entirely
7 disregarded by you in considering counts one through four,
8 which means that such evidence as you consider in connection
9 with those counts shall not include the statements intro-
10 duced into evidence which Byron NUTBROWN may have made.

11 Again I want to suggest to you that
12 while the law is for the Court and you are to apply the
13 law as given you in these instructions, the findings of
14 the facts in this case is entirely for you. Whatever
15 reference the Court has made to the evidence or pleadings
16 is only for the purpose of making application of the
17 principles of law to the issues in this case, and without
18 any purpose of indicating in the least degree how the Court
19 may think that the case ought to be decided on the facts.
20 That is for you to determine.

21 The exhibits which have been admitted
22 in evidence during the trial are for your consideration
23 and your deliberations. You will also send a copy of the
24 indictment in this matter to you in the jury room.

CHARGE

EXCEPTIONS TO THE CHARGE

1 You must return a verdict of guilty
2 or not guilty as to each count. Your verdict must be
3 unanimous. It will be delivered orally by your foreman
4 in response to inquiries made by the Clerk. This will
5 include an inquiry, if you find the defendant guilty of
6 count six, whether the conspiracy resulted in the death
7 of Byron NUTBROWN III.

8 Gentlemen?

9
10 (ALL COUNSEL AND REPORTER APPROACHED THE BENCH - OUT OF
11 HEARING OF THE JURY)

12 MR. GRAY: Your Honor, as a preliminary
13 matter I take it that Mr. HARVEY's waiver to be present
14 applies to this conference, Mr. GREENE?

15 MR. GREENE: I do waive for Ernest HARVEY
16 his right to be present at this particular conference. I
17 don't think it will add anything.

18 MR. GRAY: Thank you. Your Honor, the
19 Government has only one comment and perhaps, or a request,
20 in connection with the description of the overt act in
21 count one. The Count indicated as the second overt act that
22 they must find a conversation between Mr. HARVEY and
23 Mr. DUNHAM during the time it indicated, that the indictment
24 also charges that there were conversations - I'm sorry,
25 that's an overt act - the indictment also charges that there
26
27